

1 Douglas N. Silverstein, Esq. (SBN 181957)  
2 Michael G. Jacob, Esq. (SBN 229939)  
3 KESLUK, SILVERSTEIN & JACOB, P.C.  
4 9255 Sunset Boulevard, Suite 411  
5 Los Angeles, California 90069-3309  
6 Telephone: (310) 273-3180  
7 Facsimile: (310) 273-6137  
8 [dsilverstein@californialaborlawattorney.com](mailto:dsilverstein@californialaborlawattorney.com)  
9 [mjacob@californialaborlawattorney.com](mailto:mjacob@californialaborlawattorney.com)

10 Attorneys for Plaintiff GILBERT GUZMAN

11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 GILBERT GUZMAN, an individual,

14 Plaintiff,

15 v.

16 SPACE EXPLORATION  
17 TECHNOLOGIES CORP., a  
18 Delaware Corporation; and DOES 1  
19 through 60, inclusive,

20 Defendants.

21 **CASE NO. 2:15-cv-06000-R-RAO**

22 *[Assigned to Courtroom 8 - Honorable  
23 Manuel L. Real, Rozella A. Oliver,  
24 Magistrate]*

25 **PLAINTIFF GILBERT GUZMAN'S  
26 MOTION TO REMAND DUE TO  
27 LACK OF FEDERAL SUBJECT  
28 MATTER JURISDICTION**

29 Date: December 21, 2015

30 Time: 10:00 a.m.

31 Courtroom: 8

32 *[Concurrently filed with Notice of  
33 Motion, and Declaration of Michael G.  
34 Jacob]*

35 Complaint filed: March 9, 2015

36 Removal: August 10, 2015

37 Trial Date: May 17, 2016

1           **I. INTRODUCTION**

2           Plaintiff Gilbert Guzman (“Plaintiff”) worked for Defendant Space  
 3 Exploration Technologies Corp. (“SpaceX”) as a propulsion technician for  
 4 approximately six years. After a workplace injury, he went out on disability leave  
 5 and filed a workers’ compensation claim. Despite being in contact with Mr.  
 6 Guzman via email within days of his termination, with his managers having  
 7 knowledge of Mr. Guzman’s disability and need for leave, his managers terminated  
 8 him, all agreeing to conclude that he abandoned his job.

9           Plaintiff filed a complaint in state court, alleging disability discrimination  
 10 and related Fair Employment & Housing Act (“FEHA”) claims, as well a sixth  
 11 cause of action entitled “Interference with Leave in Violation of the California  
 12 Family Rights Act” – though the complaint in various paragraphs dually referenced  
 13 California Family Rights Act/Family Medical Leave Act. Defendant did not move  
 14 for removal initially, noting the complaint was “unclear from the face of Plaintiff’s  
 15 complaint whether the Sixth Cause of Action is brought solely pursuant to the  
 16 [CFRA]...” Szor Decl., ¶3. Defendant thereafter served a Request for Admission  
 17 upon Plaintiff in state court, asking “Admit that you are not pursuing a claim under  
 18 the federal Family Medical Leave Act.” Szor Decl., ¶¶4-5. Plaintiff denied the  
 19 RFA because the CFRA expressly “incorporates by reference” the FMLA. 2 Cal.  
 20 Code Reg. § 7297.10. Defendant thereafter filed a Notice of Removal asserting that  
 21 Plaintiff clarified he is “pursuing a claim under the FMLA.” Szor Decl., ¶5.

22           On November 18, 2015, Plaintiff filed a First Amended Complaint  
 23 eliminating any reference in his Complaint to the FMLA, retaining only references  
 24 to state law FEHA based claims and the CFRA. (Doc. #17). Plaintiff seeks remand  
 25 due to the lack of federal question subject matter jurisdiction. In situations such as  
 26 this one where the federal claims are withdrawn early in a case, the United States  
 27 Supreme Court makes clear that “the District Court ha[s] a powerful reason not to  
 28 continue to exercise jurisdiction.” *Carnegie-Mellon v. Cohill*, 484 U.S. 343, 351

1 (1988). The 9<sup>th</sup> Circuit has followed suit, making clear that while the Court retains  
 2 wide discretion, it is “generally preferable for a district court to remand remaining  
 3 pendent claims to state court.” *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205  
 4 (9th Cir. 1991). Accordingly discretionary remand is proper.

5 **II. THE BURDEN OF ESTABLISHING FEDERAL QUESTION**  
 6 **JURISDICTION IS ON DEFENDANT, AND THE REMOVAL**  
 7 **STATUTE IS CONSTRUED STRICTLY AGAINST REMOVAL**

8 Federal courts are courts of limited jurisdiction, having subject matter  
 9 jurisdiction only over matters authorized by the Constitution and Congress. See,  
 10 e.g., *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675,  
 11 128 L. Ed. 2d 391 (1994). “Under the plain terms of § 1441(a), in order properly to  
 12 remove [an] action pursuant to that provision, [the removing defendant] must  
 13 demonstrate that original subject-matter jurisdiction lies in the federal courts.”  
 14 *Syngenta Crop Protection*, 537 U.S. 28, 33 (2002). Failure to do so requires that the  
 15 case be remanded, as “[s]ubject matter jurisdiction may not be waived, and . . . the  
 16 district court must remand if it lacks jurisdiction.” *Kelton Arms Condo. Owners*  
 17 *Ass’n v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003).

18 The request for remand is timely. “If at any time before final judgment it  
 19 appears that the district court lacks subject matter jurisdiction, the case shall be  
 20 remanded.” 28 U.S.C. § 1447(c). It is “elementary that the subject matter  
 21 jurisdiction of the district court is not a waivable matter and may be raised at  
 22 anytime by one of the parties, by motion or in the responsive pleadings, or sua  
 23 sponte by the trial or reviewing court.” *Emrich v. Touche Ross & Co.*, 846 F.2d  
 24 1190, 1194 n.2 (9th Cir. 1988). Indeed, defects in subject matter jurisdiction can  
 25 even be raised for the first time on appeal; *see American Fire & Cas. Co. v. Finn*,  
 26 341 U.S. 6, 17-18, 71 S.Ct. 534, 542 (1951).

27 A removed action must be remanded to state court if the federal court lacks  
 28 subject matter jurisdiction. 28 U.S.C. § 1447(c). “The burden of establishing federal

1 jurisdiction is on the party seeking removal, and the removal statute is strictly  
 2 construed against removal jurisdiction.” *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167  
 3 F.3d 1261, 1265 (9th Cir. 1999). “Federal jurisdiction must be rejected if there is  
 4 any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980  
 5 F.2d 564, 566 (9th Cir. 1992).

6 The removal statute is strictly construed because of the ““Congressional  
 7 purpose to restrict the jurisdiction of the federal courts on removal.” *Duncan v.*  
 8 *Stuezle*, 76 F.3d 1480, 1485 (9th Cir. 1996) (quoting *Shamrock Oil & Gas Corp. v.*  
 9 *Sheets*, 313 U.S. 100, 108, 85 L. Ed. 1214, 61 S. Ct. 868 (1941)). **Any doubts** about  
 10 the propriety of removal **must be resolved in favor of remand**. *Id.* (citing *Gaus v.*  
 11 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)).

### 12 III. ARGUMENT

#### 13 A. The United States Supreme Court Is Clear that it is Preferable to 14 Remand State Law Claims to State Court when the Federal Claim 15 is Removed Early in the Litigation

16 On November 18, 2015, Plaintiff filed a First Amended Complaint  
 17 eliminating any reference in his Complaint to the FMLA, making clear that he only  
 18 relies upon state law FEHA based claims and the CFRA. (Doc. #17). Where  
 19 removal was based on a federal question, and the federal claim has been eliminated,  
 20 the court may either retain, remand or dismiss supplemental state claims. *Taylor v.*  
 21 *First of America Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1993) *Robertson v.*  
 22 *Neuromedical Center* (5th Cir. 1998) 161 F.3d 292, 296.

23 In situations such as this one where the federal claims are withdrawn early in  
 24 a case, the United States Supreme Court makes clear that “the District Court ha[s] a  
 25 powerful reason not to continue to exercise jurisdiction.” *Carnegie-Mellon v.*  
 26 *Cohill*, 484 U.S. 343, 351 (1988). The 9<sup>th</sup> Circuit has followed suit, making clear  
 27 that while the Court retains wide discretion, it is “generally preferable for a district  
 28 court to remand remaining pendent claims to state court.” *Harrell v. 20th Century*

1       *Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991). The Ninth Circuit is also clear that in  
 2 the usual case, the district court should remand the matter as once the federal claim  
 3 is removed, "the balance of factors will weigh toward remanding any remaining  
 4 pendent state claims to state court. (*Citation omitted*)." *Id.*; *see also* 28 U.S.C. §  
 5 1367(c)(3).

6       Here, in addition to the dismissal of the sole federal claim occurring early in  
 7 the proceeding, the substantive litigation of this case, including considerable written  
 8 discovery, ***has already been propounded and responded to in the state court***  
 9 ***proceeding***. Jacob Decl., ¶¶2-3. In this regard, the parties previously propounded  
 10 and responded to the following discovery in the state court proceeding:

11       Tab No.	12       Discovery Title	13       Served By	14       Date
12       1	13       Form Interrogatories-General, Set No. One	14       Defendant	15       04/30/15
13       2	14       Form Interrogatories-Employment Law, Set 15       No. One	16       Defendant	17       04/30/15
14       3	15       Special Interrogatories, Set One	16       Defendant	17       04/30/15
15       4	16       Requests for Production of Documents, Set 17       One	18       Defendant	19       04/30/15
16       5	17       Requests for Admission, Set No. One	18       Defendant	19       04/30/15
17       6	20       Form Interrogatories-Employment Law, Set 21       No. One	22       Plaintiff	23       05/14/15
18       7	24       Form Interrogatories-General, Set No. One	25       Plaintiff	26       05/14/15
19       8	27       Request for Production of Documents, Set 28       No. One	29       Plaintiff	30       05/14/15
20       9	31       Subpoena for Production of Records (Chubb 21       Group)	32       Plaintiff	33       07/02/15
21       10	34       Response to Form Interrogatories-General, 22       Set One	35       Plaintiff	36       07/09/15
22       11	37       Response to Form Interrogatories- 23       Employment Law, Set One	38       Plaintiff	39       07/09/15
23       12	40       Response to Special Interrogatories, Set One	41       Plaintiff	42       07/09/15
24       13	43       Response to Requests for Admission, Set One	44       Plaintiff	45       07/09/15
25       14	46       Response to Requests for Production of 26       Documents, Set One	47       Plaintiff	48       07/09/15
26       15	49       Response to Form Interrogatories- 27       Employment Law, Set One	50       Defendant	51       07/23/15

1	16	Response to Form Interrogatories- General, Set One	Defendant	07/23/15
2	17	Response to Request for Production of Documents, Set One	Defendant	07/23/15

3 In contrast, aside from initial disclosures and a joint stipulation to continue the trial  
4 dates, there has been no motion practice or formal discovery in the federal  
5 proceeding.<sup>1</sup> Jacob Decl., ¶¶2-3. Accordingly, in addition to the Court having a  
6 “powerful reason” to decline to exercise jurisdiction of the remaining state law  
7 claims, and the fact it is “generally preferable” that the district court remand a case  
8 no longer containing federal claims, the procedural history of this case (including  
9 substantial state law discovery) also weighs heavily in favor of remanding the  
10 matter to state court.

11

12 **B. Defendant SPACEX Did Not Properly Remove the Matter on the  
13 Basis of Federal Question Jurisdiction Because None of Plaintiff’s  
14 Claims “Arise Under” Federal Law**

15 To establish the existence of federal question jurisdiction, SPACEX must  
16 demonstrate that at least one of Plaintiff’s claims “arises under” federal law. *Rivet*  
17 *v. Regions Bank of Louisiana*, 522 U.S. 470, 474-75, 139 L. Ed. 2d 912, 118 S. Ct.  
18 921, 925 (1998) (citing 28 U.S.C. § 1331). The Supreme Court has “long held” that  
19 the federal question must appear on the face of the well-pleaded complaint. *Id.* at  
20 475. The so-called “well-pleaded complaint rule” requires that ““a right or  
21 immunity created by the Constitution or laws of the United States must be an  
22 element, and an essential one, of the plaintiff’s cause of action.”” *Id.* (quoting *Gully*  
23 *v. First Nat. Bank in Meridian*, 299 U.S. 109, 112, 81 L. Ed. 70, 57 S. Ct. 96  
24 (1936)); *see also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463  
25 U.S. 1, 10, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)) (citation omitted); *Franchise*  
26 *Tax Bd.*, 463 U.S. at 27-28 (“[F]ederal courts have jurisdiction to hear, originally or  
27 by removal, only those cases in which a well-pleaded complaint establishes either

---

28 <sup>1</sup> The parties have discussed taking depositions in January 2016.

1 that **federal law creates the cause of action**, or that the plaintiff's right to relief  
 2 **necessarily depends on resolution of a substantial question of law.**").

3 The CFRA regulations provide that they incorporate by reference the FMLA  
 4 regulations to the extent they are not inconsistent with CFRA regulations, other  
 5 state law or the California Constitution. 2 Cal. Code Regs §11097. When both  
 6 federal and California law apply simultaneously, the federal law does not supersede  
 7 any provision of California law that provides greater family or medical leave rights  
 8 than those provided by the FMLA. 29 CFR § 825.701.

9 The fact that the CFRA claim and FMLA claim share some common  
 10 elements does not transform Plaintiffs' state claims into federal claims. It is well  
 11 established that "the party who brings a suit is master to decide what law he will  
 12 rely upon," *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410,  
 13 411, 57 L.Ed. 716 (1913), and "if he can maintain his claim on both state and  
 14 federal grounds, he may ignore the federal question and assert only a state law  
 15 claim and defeat removal." *Sullivan*, 813 F.2d at 1372 (citing, *inter alia*, 1 A.J.  
 16 Moore & B. Ringle, *Moore's Federal Practice*, ¶ 0.160[3.-3], at 231-32 (2d ed.  
 17 1986)).

18 The CFRA regulations provide that they incorporate by reference the FMLA  
 19 regulations to the extent they are not inconsistent with CFRA regulations, other  
 20 state law or the California Constitution. *California Employment Law*, (Matthew  
 21 Bender 2004) sec 8.20; citing, 2 Cal. Code Reg. sec 7297.10. In this regard, the  
 22 FMLA expressly states that "[n]othing in this Act or any amendment made by this  
 23 Act shall be construed to supersede any provision of any State or Local law that  
 24 provides greater family or medical leave rights than the rights established under this  
 25 Act or any amend made by this Act." 29 C.F.R sec 2651(b); see also C.F.R. sec  
 26 825.701(a). (Emphasis added).

27 Here, SPACEX's alleged abuses – the conduct of which Plaintiff complains  
 28 – is not governed exclusively by federal law. To the contrary, the only claimed

1 basis for removal *is expressly part of* California law. The simple fact is that *none*  
 2 *of Plaintiff's state law claims contains a federal element*. Given this fact, despite  
 3 the RFA admission, Plaintiff's claims are not *created by federal law*, nor do any of  
 4 Plaintiffs' claims "*necessarily depend*" on a question of federal law. *See Berg v.*  
 5 *Leason*, 32 F.3d 422, 424 (9th Cir. 1994) (holding that a state law claim only  
 6 "necessarily" depends on a question of federal law if the state claim contains a  
 7 "federal element" that is "pivotal" to the resolution of the state claim).

8 Because federal law does not create any cause of action or claim asserted by  
 9 Plaintiff, and Plaintiff does not rely upon a federal element for purposes of his  
 10 complaint, Defendant's removal must fail.

11 Defendant's removal papers, based upon Plaintiff's denial of a single unclear  
 12 RFA (which should technically be denied because the CFRA expressly incorporates  
 13 the FMLA), does not overcome **Defendant's burden** to demonstrate the case arises  
 14 **from federal elements**, particularly given the additional hurdle requiring that the  
 15 removal be strictly construed against removal jurisdiction, and that all doubts be  
 16 resolved against removal. Because Defendant failed to carry its burden of removal,  
 17 and doubts remain as to whether removal was proper in the first instance, this  
 18 matter must be remanded to the State Court.

#### 19 IV. CONCLUSION

20 For the foregoing reasons, and because Plaintiff has filed a First Amended  
 21 Complaint (Doc. #17) eliminating reference to the FMLA and relying exclusively  
 22 upon state law claims, "the District Court ha[s] a powerful reason not to continue to  
 23 exercise jurisdiction." (*Cohill*, 484 U.S. at 351) and the case should be remanded to  
 24 state court, as it is "generally preferable for a district court to remand remaining  
 25 pendent claims to state court." *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205  
 26 (9th Cir. 1991).

27 Plaintiff alternatively requests remand because Defendant failed to carry  
 28 Defendant's burden of demonstrating removal was proper.

1 DATED: November 18, 2015

2 KESLUK, SILVERSTEIN & JACOB, P.C.

3

4

5 By: /s/ Michael J. Jacob

6 Douglas N. Silverstein, Esq.

7 Michael G. Jacob, Esq.

8 Attorneys for Plaintiff GILBERT GUZMAN

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

**CERTIFICATE OF SERVICE**

I hereby certify this 18th day of November, 2015 the foregoing  
**NOTICE OF MOTION TO REMAND; PLAINTIFF GILBERT  
GUZMAN'S MOTION TO REMAND DUE TO LACK OF FEDERAL  
SUBJECT MATTER JURISDICTION; DECLARATION OF MICHAEL  
G. JACOB** was filed electronically with the Clerk of the Court to be served by  
operation of the Court's electronic filing system upon the following:

Alexander Hernaez, Esq.  
Lee Szor, Esq.  
FOX ROTHSCHILD LLP  
345 California Street, Suite 2200  
San Francisco, CA 94104  
415-364-5540 | Main  
415-391-4436 | Fax  
ahernaez@foxrothschild.com  
lszor@foxrothschild.com

*[Attorneys for Defendants SPACEX]*

/s/ Michael Bew